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2021

This is a pre-copyedited, author-produced version of an article accepted for publication in Scots Law Times following peer review. The definitive published version ARNELL, P. and DAVIES, G. 2021. The new UK-EU extradition arrangements. Scots law times [online], 6, pages 21-23 is available online on Westlaw UK.

The New UK-EU Extradition Arrangements

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Extradition requests to Scotland under the European Arrest Warrant (EAW) have ended. Existing from 1 January 2004 to 31 December 2020 the EAW transformed aspects of Scottish and UK extradition practice. In its stead is a new set of rules applying between the UK and the EU 27 to persons arrested after 31 December. Those new rules are set out in Title VII of Part III of the Trade and Cooperation Agreement (TCA), concluded on 24 December 2020. Notably, the terms of the TCA are such that relatively few amendments to the applicable UK law, the Extradition Act 2003 (2003 Act), were necessary. The minimum punishment requirements and the statutory bars to extradition remain unchanged. This is not to suggest that there not several significant changes to the terms of extradition between the UK and the EU 27. There are.

The Trade and Cooperation Agreement

Part III of the TCA replaces several mechanisms from the EU's Area of Freedom, Security and Justice. It establishes a new framework for law enforcement and judicial cooperation in criminal matters between the UK and the EU. In addition to the EAW Framework Decision, measures governing DNA and fingerprint data sharing, the exchange of criminal record information and a system of real time arrest warrant notification have been superseded. The TCA has been provisionally applicable since 1 January 2021.

Effecting the amendments required by the TCA in UK law is the European Union (Future Relationship) Act 2020. It designates the EU 27 as Category 1 territories for the purposes of the 2003 Act. The consequence of which is that the majority of rules governing the terms of extradition with the UK's former EU partners are maintained.

The transition from the EAW to the TCA is governed by the EU-UK Withdrawal Agreement and the TCA itself. Pursuant to article 62(1)(b) of the Withdrawal Agreement where a requested person is arrested on an EAW in the UK prior to the end of Transition Period, irrespective of when the surrender decision is actually taken or the requested person is removed from the country, proceedings are governed by the EAW Framework Decision. This is given domestic force in the Law Enforcement and Security (Amendment) (EU Exit) Regulations 2019. Article 112 of the TCA provides that an EAW issued before 11 pm on 31 December 2020 but executed afterwards will be processed under the TCA.

An important operational point to note is that the UK has not secured access to the Second Generation Schengen Information System (SIS II). This is the primary method of transmitting EAWs to all Member States where the location of the wanted person is unknown. It operates on a real-time basis. In its place the TCA sets out alternative methods of transmission, including permission to circulate via Interpol. The TCA also permits parties to adopt bilateral arrangements on transmission. It is possible, at least in the short term, that loss of SIS II will lower the number of arrest warrants circulated to Scotland and the rest of the UK. This could have a direct effect on the number of executed arrest warrants.

Main Changes to UK-EU Extradition

The change to UK-EU extradition that has necessitated the most substantial amendment to the 2003 Act concerns the rules on double criminality. The essence of this change is that the orthodox iteration of the double criminality requirement must now be met in all EU extradition cases. A system akin to the hitherto applicable Framework List of offences has not been introduced – at least at present. Under the Framework Decision both the double criminality requirement and a list-system operated in conjunction. Giving effect to the changes wrought by article 79 is section 12 of the European Union (Future Relationship) Act 2020. Amended are ss 64-65 of the 2003 Act.

The double criminality terms within the TCA are similar to those in the 2003 Act and as interpreted judicially. Article 79(2) requires that “the acts for which the arrest warrant has been issued constitute an offence under the law of the executing State, whatever the constituent elements or however it is described”. This is a criterion for an ‘extradition offence’ in UK law. There are mandatory and optional limitations to the article 79(2) requirement in articles 79(3) and (4). Notably, the TCA also provides for the re-introduction of a ‘list-system’ of offences in the application of the double criminality requirement. This requires notification by the UK and an EU Member State to trigger its application *inter se*. The UK has not given such notice.

A second change that will undoubtedly affect extradition between the UK and certain EU Member States is the reintroduction of a nationality bar. Whilst article 83(1) provides that the execution of an arrest warrant may not be refused on the grounds of the nationality of the requested state, this requirement is qualified by 83(2). Member States may apply the bar upon notice being given to the Specialised Committee on Law Enforcement and Judicial Cooperation, a committee created under the TCA and charged with several roles including dispute resolution of issues arising under Part III. Of note is article 83 which provides that where a state refuses a request on the basis of nationality it shall consider instituting proceedings itself. Here the Crown Office and the CPS will likely want to explore, and where possible assist, in this alternative to extradition.

It is the Crown Office, not Edinburgh Sheriff Court, which will be affected by the introduction of the nationality bar. The UK has never demonstrated a general compunction to extradite for that reason alone. Certain other states hold strongly held views on the issue, however. Indeed, Germany, Austria and Slovenia have constitutional bars on the extradition of their nationals. An instance where this could have had an impact upon criminal justice in Scotland is the case of Slovak Marek Harcar. He was returned to Scotland from Slovakia and tried and convicted for a murder committed in Glasgow in 2008.

The political offence exception to extradition is provided for in the TCA, unlike the Framework Decision. It is an area where cases may occasionally arise. Again, this would apply to outgoing requests. The 2003 Act has not been amended in this regard. Of some note is that article 82 of the TCA provides that the parties must not bar extradition for offences including those referred to in articles 1 and 2 of the European Convention on the Suppression of Terrorism 1977 and falling within

the definition of terrorism under Annex Law-7 of the agreement. It may be permitted in other cases. As UK law stands, the new terms under the TCA would not have an affect on a case similar to that of Clara Ponsati, whose extradition from Scotland to Spain for rebellion and misuse of public funds was dropped in 2018.

Proportionality and Human Rights

It is clear that regardless of the TCA the subjects most commonly put forward in extradition hearings, human rights and proportionality, will remain the same. Section 21A of the 2003 Act is unamended. Extradition judges continue to be obliged to decide whether the extradition would be compatible with Convention Rights and would be disproportionate. Of some note is that human rights and proportionality are expressly provided for in the TCA, in contrast to the Framework Decision. The TCA, for instance, provides that where there are substantial grounds for believing that there is a real risk to the human rights of the requested person the judicial authority may require additional guarantees, as per art 84(c).

Proportionality in the issuance of EAWs, something advocated by the UK for some time, is specifically referred to in the TCA in article 77. It provides that extradition cooperation shall be necessary and proportionate. Listed are the factors to be considered. These are the rights of the requested person and the interests of the victims, the seriousness of the act, the likely penalty that would be imposed, and the possibility of less coercive measures being taken particularly with a view to avoiding unnecessarily long periods of pre-trial detention. This list of considerations is wider than the those found in section 21A of the 2003 Act. Whether this makes any material difference to the operation of section 21A will be a matter for the common law. Somewhat similar to human rights, further information may be requested by a court in its assessment of proportionality, under article 93(2).

Conclusion

The TCA sets out a level and form of extradition cooperation that is unprecedented for a non-EU, non-Schengen area state. It has required relatively few amendments to be made to the 2003 Act. From a criminal cooperation point of view the TCA is very welcome. A non-negotiated outcome would have resulted in the UK falling back on the European Convention on Extradition 1957 which in turn would have resulted in significant changes to the process and concomitant delay. The changes that have been made to the previous arrangements affect Scottish and UK extradition positively and negatively. Positively, the inclusion of specific reference to human rights and proportionality within the TCA provide an international basis for those provisions within the 2003 Act. Negatively, changes to double criminality and the introduction of a nationality bar may respectively increase the subject matter under consideration in extradition hearings in some instances and frustrate certain UK outgoing requests.

The TCA largely replicates the operative provisions in the Framework Decision and there have been relatively few amendments to the 2003 Act. This does not mean judicial challenges are unlikely, however. An early instance of which is *Polakowski and others v Westminster Magistrates Court*, [2021] EWHC (Admin), decided by

the English High Court. Here an argument that the transitional provisions did not provide for a legal basis for the appellants' arrest was given short shrift. It was held that "... as a matter of constitutional principle, the correct starting point for the legal analysis is the Act of Parliament which governs extradition – the 2003 Act – and the domestic law which modified it, not the Framework Decision or any other piece of EU law, not any unincorporated international agreement" (at para 15). It appears clear that the differences between the TCA and Framework Decision are unlikely to lead to significant changes in UK-EU 27 extradition. Overall, the new extradition arrangements, whilst not a mirror of the Framework Decision, create a scheme quite similar to it with a few notable exceptions. Such a result – once an overall Brexit deal was agreed – was not unexpected considering the importance of criminal cooperation to both parties and their negotiating 'red-lines'.